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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. [redacted] 129

UNITED STATES OF AMERICA,
Respondent,

VS.

ARLO C. CRANCE, J. V. CRANCE, RALPH CRANCE, MINNIE NEWPORT, ROSE B. McKEE, AND ELIZABETH MILLER,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Arlo C. Crance, J. V. Crance, Ralph Crance, Minnie Newport, Rose B. McKee and Elizabeth Miller, by their Counsel, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, reversing the judgment of the United States District Court for the Western District of Missouri.

OPINIONS BELOW

The Memorandum Opinion, Finding of Fact and Conclusions of Law of the United States District Court, filed May 17, 1962, reported at 214 F. Supp. 792 (D.C. W.D. Mo. 1962), respecting the question of enhanced valuation, and establishing the measure of damages for the trial below is set out in the Appendix hereto at page A1.

The judgment of the United States District Court in accordance with the jury verdict determining damages for the appropriation, filed May 13, 1963, is set out in the Appendix hereto at page A13.

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 341 F.2d 161 (8th Cir. 1965) filed February 11, 1965, is set out in the Appendix hereto at page A17.

JURISDICTION

The jurisdiction of this Honorable Court is invoked on the grounds that the United States Court of Appeals for the Eighth Circuit erroneously and illegally reversed the judgment of the United States District Court for the Western District of Missouri for the following reasons:

(a) The Court of Appeals has erred in a matter of great public concern and its decision is in direct conflict with the applicable decisions of this court respecting the treatment of the question of enhanced value in condemnation proceedings in that it abandoned the law as stated by this court in the case of *United States* v. *Miller*, 317 U.S. 369 (1943), l.c. 376-377, which departure was made at a time when the constitutionally guaranteed property rights of the public and the sovereign's inherent power of eminent domain are in collision, requiring that the established law

be adhered to and further delineated in order to clarify and insure the substantial rights herein involved, and to prevent the massive confusion that will necessarily result if the decision of the Court of Appeals is allowed to stand.

(b) The judgment of the Court of Appeals constitutes an abuse of the appellate process and is violative of the law as established by the applicable decisions of this court in that the Court of Appeals made an improper and unwarranted finding of fact completely contrary to that of the District Court to which the involved issue of fact had been submitted without a jury, when the finding of the District Court was not clearly erroneous and was supported by extensive testimony and documentary evidence from which no definite and firm conviction that a mistake had been committed could be implied, all of which is such a departure from the accepted course of judicial proceedings that the same calls for an exercise of this Court's power of supervision in order to prevent unfounded appeals made with the hope of securing improper *de novo* review.

The judgment of the United States Court of Appeals for the Eighth Circuit reversing the judgment of the District Court was entered February 11, 1965.

The order of the United States Court of Appeals for the Eighth Circuit denying Petition for Rehearing was entered March 9, 1965.

No request has been made by the petitioners for an extension of time within which to file this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (62 Stat. 928, June 25, 1948, Ch. 646).

QUESTIONS PRESENTED FOR REVIEW

1. When the Government, after establishing a public project, condemns property which was enhanced in value by the project and was not within the probable scope of the project, may a court of appeals, by its decision, permit the Government to appropriate that property for less than the enhanced value and for less than the just compensation guaranteed by the Fifth Amendment to the Constitution of the United States, as defined in the decisions of this Court and particularly in *United States* v. *Miller*, 317 U.S. 369 (1943)?

2. May a Court of Appeals reverse the judgment of a District Court entered in conformity with a jury verdict on the basis that an instruction given the jury was inaccurate when the same adequately and properly stated the applicable law and in any event was not inconsistent with substantial justice and did not affect the substantial rights of the parties.

3. In a cause tried before a District Court without a jury may a Court of Appeals reverse the District Court's judgment by making a finding of fact contrary to that of the trial court when the latter was clearly based upon extensive testimony and substantial documentary evidence received in a succession of pre-trial hearings, which the record discloses was not clearly erroneous.

CONSTITUTIONAL PROVISION

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; *nor shall private property be taken for public use without just compensation.* U. S. Const. Amend. V.

STATEMENT OF THE CASE

This case results from the condemnation by the United States of the fee title of petitioners to thirty-five acres of land situated in Hickory County, Missouri (R. 1-5). This land was taken for development by the United States as a public recreational access area adjoining the Pomme de Terre reservoir (Govt's. Ex. 8, plate 4) and was a portion of a 132.5 acre tract owned by petitioners.

Under the original land acquisition policy of the United States for the development of the Pomme de Terre reservoir, each 40 acre tract partially or wholly within the full pool reservoir line was to be taken in fee (Govt's. Ex. 1, "General Design Memorandum No. 1", dated April, 1953). The 35 acre tract in question was scheduled for acquisition in its entirety as part of a 40 acre tract touching upon the full reservoir line. In October, 1953, the land acquisition policy of the United States was revoked by the Chief of Army Engineers and a new policy substituted, under which the United States was to acquire fee title only up to the elevation calculated by hydrologists to be subject to flooding once in five years (Govt's. Ex. 4). This new policy also provided that the United States would acquire areas for public access and recreation and was incorporated into the project plans in Design Memorandum No. 5, dated June, 1956 (Govt's. Ex. 5). Under the new land acquisition policy, the 40 acre tract, of which the 35 acre tract in controversy was a part, was excluded from the project except for a

taking of 6.25 acres in fee and a 7 acre flowage easement (plate No. 2, Govt's. Ex. 5; Ex. 6). This Design Memorandum, in covering the subject of public recreational access areas, also proposed 25 sites for such purpose from which 14 were to be finally selected for development. (R. 55) The 35 acre tract involved herein was not included in the 25 possible sites recommended in 1956 (Govt's. Ex. 5, p. V-8).

The United States became committed to the Pomme de Terre reservoir project by public law 641 (effective July 2, 1956), 70 Stat. 474, *et seq.*, which authorized the project and appropriated funds for its execution (R. 47). Thereafter, in 1957, the Corps of Engineers secured final engineering data for the needs of the reservoir and revised the land acquisition plans in respect to the 35 acres in question. Under this revision, the United States was to acquire from petitioners only five acres in fee and a 2.07 acre flowage easement (Govt's. Ex. 9, dated July 24, 1957). In reliance on this revision, and the express representations by authorized agents of the United States that petitioners' remainder would be unaffected, on October 10, 1958, the United States acquired from petitioners by voluntary conveyance fee title to the five acres and a flowage easement of 2.07 acres (R. 83) (R. 107-108). Thus, the 35 acres in question were excluded from the reservoir project requirements by the 1957 revision (Govt's. Ex. 9) except for the flowage easement of 2.07 acres. This voluntary transaction left the petitioners with the 35 acre tract in question, which had direct access to the reservoir at the full flood pool level and over land subject to the 2.07 flowage easement which the government represented would remain the property of petitioners. This 35 acre tract was adjacent to an additional tract of 92.5 acres owned by petitioners, being separated from this remainder by an unpaved county road (R. 100).

In June, 1956, 25 sites located on all sides of the reservoir were designated by the United States for use as public recreational access areas (R. 55), after a thorough examination of the entire reservoir area (Govt's. Ex. 5, p. V-8). These sites did not include the land of the petitioners. Of such 25 sites, 14 were recommended for final development in June, 1956 (Govt's. Ex. 5, pp. V-8, V-11). Of these 14 selected access areas, two were located on the same side of the reservoir as petitioners' property, one about one and a half miles upstream and the other the same distance downstream from the petitioners' land (R. 39). These selections were made by considerations of location, proximity of population centers, topography, accessibility to township roads, boundaries of ownership, and avoidance of severance (R. 34) (Govt's. Ex. 5, pp. V-8, V-9). The Missouri Conservation Commission, a cooperating state agency, concurred in these final selections (R. 34, R. 55). In December, 1956, these 14 sites were reduced to 8 for final development, the two sites within a mile and a half of petitioners' land being among those eliminated. At this time there was no consideration of the petitioners' land for possible use as a public recreational access area (Govt's. Ex. 5, pp. 8-9, 4th Indorsement). The land of the petitioners was and remains the only parcel taken after the selection of these eight tracts for such use and its taking in August, 1961, is separated from these prior selections by some five years.

In June, 1960, a public meeting was held at Bolivar, Missouri, regarding the recreational development of the Pomme de Terre reservoir (Govt's. Ex. 8). The eight public recreational access areas finally selected in 1956 for development were discussed at this meeting (R. 65) and residents of the area on the side of the reservoir on which petitioners' land is situated, complained that the provisions made by the Corps of Engineers inadequately served their side of the reservoir (R. 66). As a result, a later meeting

was held on July 12, 1960, at which the United States announced consideration of four additional sites for possible development as public recreational access areas, the same being an unplanned expansion of the reservoir project. The land of the petitioners was included as one of these four tracts, and this was the first reference to such possible use of the 35 acres (Govt's. Ex. 8, App. I, pp. 49-54). The petitioners' land was later selected by the Corps of Engineers for development (Govt's. Ex. 8, p. 11) and authority to acquire the land in question was given on March 3, 1961 (Govt's. Ex. 8, 1st Endorsement, pp. 2-3). On August 4, 1961, the United States filed its complaint in condemnation and declaration of taking of fee title to the 35 acres of land herein involved in the United States District Court for the Western District of Missouri (R. 162) depositing in the registry of the court the sum of $765 declared by the Secretary of the Army to be just compensation therefor (R. 156). The District Court entered its judgment upon the declaration of taking on the same date (R. 162). The question of petitioners' right to receive compensation for the 35 acres based upon the land's greater value as lake shore property rather than its value unaffected by the establishment of the reservoir, was submitted by agreement of the parties to the District Court without a jury, at the pre-trial hearings (R. 6-120). After hearing extensive testimony of the representatives of the government in charge of the execution of the project, and receiving voluminous documentary evidence (R. 6-120), the District Court made its findings of fact and conclusions of law finding that the petitioners' land was not within the probable scope of the reservoir project from the time the United States was committed to it, and, that the law as established by this Court in *United States* v. *Miller*, 317 U.S. 369 (1943), required that the land in question be valued as lake front property including any enhancement in value resulting from its proximity to the reservoir project (Re-

ported 214 F. Supp. 792 (D.C. W.D. Mo. 1962)) (set forth in full in the Appendix hereto at page A1).

The District Court found that:

> "Under the circumstances it would be a violation of the Fifth Amendment of the United States Constitution to take the defendants' lands for public use without compensation for the enhanced value of the lands at the time of the taking in July, 1961. This is a case where the acquisition of an access area was conceived not as a part of the original undertaking but as an unanticipated afterthought and as an independent enterprise (214 F. Supp. 792, 797) (App. A10).
>
> "It is not in the broad declarations of the Bill of Rights that the rights of the individual are secured. It is in the detailed implementation thereof through judicial and administrative procedures. The working rule announced in the case of *United States* v. *Miller* to do substantial justice in eminent domain procedures is a salutary one intended to prevent erosion of constitutionally secured individual rights through ineffective and inequitable judicial procedures. It would be a denial of the right to just compensation guaranteed by the Fifth Amendment to deny the right to enhanced value when the United States has made a sudden and improbable change in the scope of the project over four years after it became committed to the project upon a plan showing definite lines and boundaries for acquisition of the property adjacent to the reservoir. This is particularly true when, as in the present case, dealings were had with the landowners resulting in voluntary conveyances of contiguous property to the United States on the basis of the apparently definite plans." (214 F. Supp. 797, 798) (App. A11).

The trial court then ruled upon these findings that the jury be instructed that the value of the lands taken should be the market value at the time the declaration of taking was filed in the District Court, namely, August 4, 1961, and that this value should be the fair market value

of the land taken as enhanced by its proximity to the Pomme de Terre reservoir (214 F. Supp. 792, 798) (App. A12).

Upon trial the jury awarded the petitioners $17,500.00 as just compensation for the 35 acres in question (R. 154), the jury having viewed the property and petitioners' remaining lands which the government alleged to be specially benefited by the taking (R. 122). The landowners' witnesses placed the value of the 35 acres at from $16,000.00 to $33,000.00 as lake front property, *after* expressly considering possible special benefits to the remainder of petitioners' land (R. 123-130). The government's witnesses placed the value of the 35 acres at from $3,825.00 to $4,100.00, *after* considering special benefits to the remainder (R. 131-143).

The District Court entered judgment in accordance with the verdict, and subsequently overruled the United States' motion for new trial, which questioned the trial court's application of the rule set out in *United States* v. *Miller*, 317 U.S. 369 (1943) and the propriety of the charge given the jury as to special benefits (this charge is set out in full in the Appendix at page A13). The United States appealed to the United States Court of Appeals for the Eighth Circuit, which reversed and remanded the case by its order entered February 11, 1965 (App. A17), and overruled petitioners' motion for rehearing by its order dated March 9, 1965.

BASIS OF JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

28 U.S.C. 1358 (June 25, 1948, c. 646, 62 Stat. 935) provides:

> "The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies."

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The judgment of the Court of Appeals is in conflict with the controlling decisions of this Court, and especially the decision in *United States* v. *Miller*, 317 U.S. 369 (1943) l.c. 376-377, respecting the just compensation to which a property owner is entitled under the Fifth Amendment to the Constitution of the United States, in eminent domain proceedings appropriating his property, which has been enhanced in value at the time of the taking by the prior establishment of a public project, for which it was not "reasonably probable" that the condemned land would be required.

2. The Court of Appeals erroneously determined the issues of estoppel and the District Court's instruction to the jury respecting special benefits, necessitating exercise of this Court's power of supervision.

3. The Court of Appeals departed from the accepted and usual course of judicial proceedings established by this Court, by ignoring and setting aside, without authority of law, findings of fact lawfully made by the District Court which are not clearly erroneous, and by substituting its own original findings of fact, thereby making necessary the exercise of this Court's power of supervision.

1. The judgment of the Court of Appeals is in conflict with the controlling decisions of this Court, and especially the decision in United States v. Miller, 317 U.S. 369 (1943), l.c. 376-377, respecting the just compensation to which a property owner is entitled under the Fifth Amendment to the Constitution of the United States, in eminent domain proceedings appropriating his property, which has been enhanced in value at the time of the taking by the prior establishment of a public project, for which it was not "reasonably probable" that the condemned land would be required.

The Court of Appeals recognized that the rule in *United States* v. *Miller*, 317 U.S. 369 (1943), controls the treatment of the issue of enhanced value in this cause but proceeded to a result which is in direct conflict with the holding of that case. In the Miller case, this court announced the rule of law applicable to the issue of enhanced value as follows:

> "If the distinct tract is condemned, in whole or in part, other lands in the neighborhood, may increase in market value due to the proximity of the public improvement erected on the land taken. Should the government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the project improvement.
>
> *"The question then is whether the respondent's lands were probably within the scope of the project from the time the government was committed to it.* If they were not, but were merely adjacent lands, the

> subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If on the other hand, they were, the government ought not to pay any increase in value arising from the known fact that the land probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the government's activities." *U. S.* v. *Miller*, 317 U.S. l.c. 376-377.

The Miller Rule seeks to adjust the property rights of the citizen and the sovereign's power of eminent domain; it is an attempt to insure that the Fifth Amendment's guarantee of just compensation is judiciously applied in a manner fair to both the government and to the individual landowner. The judgment of the Court of Appeals is in direct conflict with the purpose and holding of the Miller case and if allowed to stand it will permit the sacrifice of the individual's protection under the Fifth Amendment and allow a windfall to the government for indecisiveness and delay. Indeed the clarity of the opinion in the Miller case and the ready and clear applications of it in numerous decisions of the United States District and appellate courts in the twenty-two years since its pronouncement, *e.g.*, *Blas* v. *United States*, 261 F.2d 636 (9th Cir. 1958); *Scott* v. *United States*, 146 F.2d 131 (5th Cir. 1944); *Smither* v. *United States*, 118 Ct. Cl. 650, 91 F. Supp. 582 (1950), *cert. denied* 340 U.S. 931 (1951); and *United States* v. *Ragno*, 136 F.2d 376 (1st Cir. 1943), *cert. denied* 320 U.S. 776 (1943), would seem to make that case readily and easily applicable with no doubt or cloud. Not until the Court of Appeals for the Eighth Circuit misconceived its scope and application in this proceeding, has there been presented to this Court reason for exposition of the meaning of the Miller case. As a result of the error of the Court of Appeals, it is imperative that this Court not only re-

verse the decision below, but also declare new and unmistakable guidelines for the protection of the constitutional guaranty afforded the citizen whose property is condemned. In this time when the government must more and more frequently take private property for the vast projects of flood control, river improvement, interstate highway construction and other public works; it is a matter of great public importance and concern that the respective rights of the government and the individual property owner be further defined in order that the doctrine of the Miller case not again be misapplied. This course must be taken by this Court in order to head off future injustice to both the government and the individual, and to avoid the massive confusion which will result from the decision of the Court of Appeals, if it is allowed to stand.

In petitioners' Statement of the Case, *supra*, reference is made to various evidentiary matters before the District Court which, when taken together, clearly indicate that petitioners' property was not within the pobable scope of the government's original reservoir project. The Miller Rule is a test of reasonable probability and as such it can be applied only by considering the various factual circumstances present in each individual case. It does not require that a formal, official act of the government exclude a given tract from a project, as the Court of Appeals appears to believe (App. A17). In fact, it is doubtful if the government, acting through the Corps of Engineers, would at any time make such a final declaration. The District Court considered that all public access areas, except the petitioners' land, were selected in 1956, over five years before the selection of the subject land (Gov't's. Ex. 5, p. V-8; R. 55); that these selections were based on engineering data, topography, and location in respect to population centers and roadways, none of which changed in the

five year interval (R. 34; Govt's. Ex. 5, pp. V-8, V-9); that petitioners' land was at no time considered or studied respecting such use until 1960 (Govt's. Ex. 5, pp. 8-9, 4th Ed.) and then only because certain private interests objected that the government's project did not include a taking comparable in location to the one herein involved (Govt's. Ex. 8; R. 34, 65, 66). Respecting the 1956 selection and later elimination of public access areas, the trial court also considered as evidence of lack of probable inclusion of petitioners' land in the government's project, that two comparable sites, each located within one and a half miles of petitioners' land, on the same side of the reservoir, were selected for development in June, 1956, and eliminated from the project in December, 1956 (R. 39; Govt's. Ex. 5, pp. V-8, V-11)—the only reasonable conclusion being that an access area in this vicinity (and particularly petitioners' land which was at no time considered for a recreational area) was unnecessary and, therefore, not within the probable scope of the recreational aspect of the project. The District Court also considered the fact that the instant taking was and remains the last area condemned for public access use. This factor assumes substantial significance when related to the five years separating the 1956 selections and the selection in 1961 of the petitioners' land, *John L. Roper Lumber Co.* v. *United States*, 150 F.2d 329, 332 (4th Cir. 1945). All of these factors in evidence clearly establish a definite path that leads to and sustains the conclusion of the District Court that the taking of petitioners' land was not within the probable scope of the project. Added to these considerations was the extensive testimony of the representatives of the Corps of Engineers (R. 8-120) the very men who were responsible for the layout and construction of the project, including public access areas, whose testimony directly supported the fact that after the 1956 selections, the taking of the petitioners' land was at no time within

the probable scope of the project—the project that these witnesses were charged with executing.

Included in this testimony is that of the land purchaser for the government who, in 1958, negotiated the voluntary conveyance of a portion of petitioners' land adjacent to the property in issue, and *his statement that there would be left to the petitioners a valuable remainder of lake front land* (R. 107-108). The evidentiary effect of this specific testimony, apart from any consideration of estoppel which it does constitute, is clear—that the petitioners' land was not within the scope of the government's existing project and that its later taking constituted an expansion of the original project, in effect being a new and separate undertaking. The Court of Appeals below ignored the evidentiary weight of this testimony, in fact, the very existence of it, ruling that governmental estoppel had not been proved and giving no weight to this evidence as having any bearing on the issue of probable inclusion in the government's project.

The obsession of the Court of Appeals to find an officially designated final plan of the entire project completely nullifies the purpose of the rule in *United States* v. *Miller*. The Court of Appeals in its erroneous finding of fact maintains that all property which abutted the reservoir line would be within the probable scope of the project for use as an access area for an indeterminate length of time (App. A20). The complete lack of reason for this position can be demonstrated by the fact that the court is establishing a no man's land around the 100 mile shoreline of the reservoir of which none is required for reservoir purposes and a very few acres for public access areas. Such a burden on private ownership escapes reason and is one of the two extremes which the Miller Rule of probable inclusion was designed to eliminate. These

extremes are (1), the onerous and unreasonable burden upon the government to pay for the value which it will create by the very project for which the property is to be condemned, and (2), the equally onerous and unreasonable burden on the property owner of being effectively denied of the use of his property without due process of law and receipt of just compensation. Neither of these extremes is compatible with the concept of just compensation and this court in *United States* v. *Miller* established the sound test of probable inclusion in order to insure fairness to both the government and the governed.

The error of the Court of Appeals below in the present proceeding is clear from the record, but further, its judgment as reported, in its obvious conflict with the decisions of this Court, throws a cloud over the complex area of the law of eminent domain involved, which is of great public concern in this era when the reasonable needs of the public interest demand more and more frequent exercise of the sovereign's power of eminent domain.

2. The Court of Appeals erroneously determined the issues of estoppel and the District Court's instruction to the jury respecting special benefits, necessitating exercise of this Court's power of supervision.

The opinion of the Court of Appeals concluded that the District Court improperly applied the doctrine of estoppel against the government in finding that no evidence was adduced indicating reliance on the acts and representations of the government that the petitioners' property here involved would not be taken for the reservoir project (App. A27). This position is completely untenable, for the judgment of the District Court in no way attempts to estop the government from exercising its sovereign power of eminent domain, nor is a map line the crux of that court's decision as the Court of Appeals chose to maintain. The

record shows that the land buyer for the government specifically testified that he represented to petitioners in negotiating the 1958 sale that that conveyance would satisfy the government's need for their land and that they would be left with lakefront property, that is, the property now in issue (R. 107-8). Also, long prior to the 1958 negotiations, the acts of the government in acquiring all land required for the reservoir and all planned public access areas made a firm and reasonable basis for the land buyer's representations to be accepted and relied upon by petitioners. That the 1958 conveyance was, in fact, made voluntarily to the government stands as evidence that petitioners did detrimentally rely on the prior actions of the government and the representations of its land buyer as does the testimony of the government's witness that petitioners refused to sell the property (later condemned) to a third party for the sum of $11,000 (R. 117-120). This evidence is irreconcilable with any inference that petitioner's land was probably included in the project. Also, it should be noted that this witness, a government appraiser of 30 years experience in reservoir projects (R. 116), testified that the government had "realized we may have to pay enhanced value" (R. 119) for the land herein involved. The suggestion by the Court of Appeals that the land buyer's actions could in no way be binding upon the government, as it cannot be bound by the unauthorized acts of its agents, is likewise untenable. There is nothing in the record even suggesting that the land buyer exceeded his authority in representing that the petitioners would be left the land condemned in this action. He was authorized to negotiate the 1958 conveyance, and the same was, in fact, consummated, the government accepting the voluntary conveyance and its benefits. His actions in securing this conveyance were clearly within what necessarily was the scope of his mission, that is, to negotiate the sale without recourse to litigation.

This he did, and even the government is held to be bound by the acts of its agent in performing his designated duty in a manner well within the scope of his authority. See, e.g., *Massaglia* v. *C.I.R.*, 286 F.2d 258, 262 (10th Cir. 1961).

Further, the acts of the government, the representations of the land buyer, and the testimony to the effect that the government realized that it might have to pay enhanced value for the petitioners' property, if not consituting estoppel, as the Court of Appeals suggests, is clearly substantial and proper evidence of the primary issue before the District Court. These factors are clear indications that the government did not consider the land here involved as within the probable scope of the reservoir project. The consideration of estoppel by the District Court, then, if erroneous, was harmless, could, in no way have affected the substantial rights of the parties, was not inconsistent with substantial justice, and the Court of Appeals in considering this collateral issue reached a highly improper and unjust result which cannot sustain reversal of the District Court, and calls for the exercise of this Court's power of supervision. Fed. Rules Civil Procedure 61.

Respecting the instruction of the District Court on the matter of special benefits, the Court of Appeals found that it was "inaccurate" (App. A28). Again, the Court of Appeals' action regarding this collateral issue is improper and cannot sustain its reversal of the judgment of the District Court below. The entirety of the District Court's instructions to the jury on the subject of damages is set out in the Appendix at page A12, and when considered as a whole and in light of the circumstances of this case (which the Court of Appeals apparently did not choose to do as is indicated by the portion of the charge set out in its opinion (App. A27)), it is clear that the jury was adequately and accurately informed of the applicable rule of law. When

the instruction is considered in light of the expert testimony on the subject of special benefits, counsels' argument (R. 124, 127, 128, 130, 133, 138, 140); the express mathematical process given to the jury for the effectuation of the set-off of special benefits (R. 138, 149), and the fact that pursuant to the stipulation of the parties, the jury viewed the condemned land, the remaining property alleged to be specially benefited, and three tracts selected by each of the parties which were similarly located and alleged to be likewise specially benefited (R. 121-122, 155), it is clear that the applicable law was squarely presented to the jury in a clear and accurate manner.

The authorities cited by the Court of Appeals (App. A25) respecting this instruction do not sustain its reversal of the District Court. In *United States* v. *River Rouge Improvement Company,* 269 U.S. 411 (1926), there was no controversy as to any alleged defect in defining special benefits as a legal proposition. In that case the trial court was found to be in error because the district judge minimized the nature and extent of the possible special benefits, not because the definition was inaccurate. 269 U.S. l.c. at 417. This case states no legal concept that is incompatible with the instructions given by the District Court below. The Court of Appeals also relied on the case of *United States* v. *2477.79 Acres of Land,* 259 F.2d 23 (5th Cir. 1958), which, as it was in the *River Rouge* case, is completely compatible with the District Court's instruction. In that case the Court of Appeals for the Fifth Circuit stated:

> "We think that special benefits are those which are direct and peculiar to the particular property as distinguished from the incidental benefits enjoyed to a greater or less extent by the land in the area of the improvement. A special benefit is nonetheless such

because other land in like situations are similarly benefited." 259 F.2d l.c. at 28.

This language in no way suggests that the instruction given by the District Court below was improper, inadequate or inaccurate. In addition, if the special benefits instruction was not proper as given, the same is not inconsistent with substantial justice in this case and should have been disregarded by the Court of Appeals in this proceeding as the same does not, in the circumstances, affect any substantial rights of the parties. Fed. Rule Civil Procedure 61. Thus, the action of the Court of Appeals regarding the special benefits instruction is such as demands the exercise of this Court's power of supervision.

3. The Court of Appeals for the Eighth Circuit departed from the accepted and usual course of judicial proceedings established by this Court, by ignoring and setting aside, without authority of law, findings of fact lawfully made by the District Court which are not clearly erroneous, and by substituting its own original findings of fact, thereby making necessary the exercise of this Court's power of supervision.

The District Court below sitting without a jury and after hearing extensive testimony by representatives of the government (R. 6-120) and considering voluminous documentary evidence (Govt's. Exhibits 1, 2, 3, 5, 6, 8, 9, 10A-10G, and 14), found that *the scope of the government's reservoir project did not include the taking of petitioners' land* and that therefore the government in condemning this land as an expansion of the planned undertaking must pay its market value enhanced by its proximity to the earlier project. 214 F. Supp. 792, 798 (App. A1). However, the Court of Appeals ignored the District Court's findings of fact and substituted its findings for them. The Court of Appeals specifically found that be-

cause the petitioners' property abutted the reservoir, it was, therefore, and apparently for no other reason, within the scope of the project from its inception. 341 F.2d 161, 165 (8th Cir. 1965) (App. A17).

Rule 52 (a), Federal Rules of Civil Procedure, provides that an appellate court shall not set aside a trial court's findings unless the same are clearly erroneous. The Court of Appeals for the Eighth Circuit, heretofore, has adhered to this rule, e.g., *Federal Savings and Loan Insurance Company* v. *First National Bank,* 164 F.2d 929, 932 (8th Cir. 1947); *Luzier's, Inc.,* v. *Nee,* 106 F.2d 130, 135 (8th Cir. 1939); *Anderson* v. *United States,* 65 F.2d 870, 871 (8th Cir. 1933); and the same has been clearly established by the decisions of this court. In *United States* v. *United States Gypsum Company,* 333 U.S. 364 (1948), this court stated that findings of a District Court in proceedings heard without a jury are not to be set aside on appeal unless *clearly erroneous,* that is, only when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. 333 U.S. l.c. at 394; *U. S.* v. *Oregon Medical Society,* 343 U.S. 326, 339 (1952); *McCaughn* v. *Real Estate Board and Trust Company,* 297 U.S. 606, 608 (1936); *Remington Rand, Inc.,* v. *Societe Internationale Pour Participation Industrielles Et Commerciales, S.A.,* 18 F.2d 1011, 1013 (D.C. Cir. 1951).

The Court of Appeals apparently concluded that an official administrative finding by the Corps of Engineers that plans for a reservoir project are complete and final is necessary, before any land abutting on a reservoir can be valued in eminent domain proceedings at a value enhanced by the establishment of the reservoir. Failing to find a determination by the Corps of Engineers that the project was complete prior to the filing of the Declara-

tion of Taking of the petitioners' land, that court set aside the findings of the District Court and substituted its finding that the petitioners' land was within the scope of the reservoir project from its inception, 341 F.2d l.c. at 166 (App. A17), and accordingly ruled that the condemned property must be valued without reference to the enhancement of its value resulting from the establishment of the reservoir. This conclusion is violative of the law of eminent domain, as the same has been established by this Court, and ignores the requirement, established by this Court, that the District Court's finding must be clearly erroneous before it may be set aside. The District Court, as the record indicates, considered the Government's Exhibits, which are submitted to the court with this petition, and heard extensive oral testimony of officers of the Corps of Engineers and civilian employees who had participated in the reservoir project from its inception, including consideration of sites and selection of the various public access areas. The Court of Appeals, ignoring the evidence before the District Court and the findings of fact made by it, set aside the trial court's findings, although such evidence clearly demonstrated conduct of the government which supported the finding that the land of petitioners was not within the probable scope of the government's project. Furthermore, the Court of Appeals did not, in its opinion, undertake to establish that the District Court's findings of fact were clearly erroneous.

The fact issue before the District Court was decided in conformity with and as required by *United States* v. *Miller,* 317 U.S. 369 (1943), and *Shoemaker* v. *United States,* 147 U.S. 282 (1893). These cases established probability of inclusion of property in the original project as the test of whether or not, in eminent domain proceedings, land may be accorded an increment in value resulting from its proximity to a public project. This test requires utiliza-

tion of "hind sight" analysis, that is, looking back from the date of the taking to the time the government became committed to the original project and giving weight to the intervening acts, plans, and conduct of the government, is it demonstrated that there was a reasonable probability that the condemned land would be required for the project. The fact that there was no final administrative determination of finality of the project is by the very language of the Miller Rule not a requirement. What is required is consideration of the total circumstances, that is, the study of the documentary evidence and the testimony of the government's representatives who were in actual control of the project. In hearing this testimony, the District Court, relating the same to the other evidence before it, found that the petitioners' land was not within the probable scope of the government's project. By setting aside this finding, the Court of Appeals has rewarded the administrative indecisiveness of the Corps of Engineers, which obviously would never make a ruling that a given project was complete. This result is occasioned by the Court of Appeals departing from what is required of it by Rule 52 (a), Federal Rules of Civil Procedure, and the action of that court is a clear example of what established federal practice, as represented by that rule and this court's decisions, is designed to prevent. The same constitutes an abuse of the appellate process on the part of the Court of Appeals and will encourage unfounded appeals by parties seeking improper *de novo* review, and in the interests of justice requires exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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APPENDIX

Opinion of the District Court below upon the pretrial issue of allowance of enhanced value as just compensation, reported as *United States* v. *35.00 Acres of Land, Etc.*, 214 F. Supp. 792 (D.C. W.D. Mo. 1962):

BECKER, District Judge.

On August 4, 1961, the United States filed in this Court its complaint in condemnation and Declaration of Taking of fee title to 35 acres of land belonging to the defendant landowners. The Declaration of Taking was signed under date of July 24, 1961, by the Secretary of the Army pursuant to statutes authorizing acquisition of lands for use in connection with the construction and establishment of the Pomme de Terre Dam and Reservoir on the Pomme de Terre River, Missouri. Flood control in the Missouri River basin was the primary purpose for which the dam and reservoir project was authorized.

Incidental authorized uses included the establishment of public recreational areas with access to the margin of the reservoir (hereinafter referred to as access areas). The land involved here was taken for use as an access area.

On August 4, 1961, the Court entered its judgment upon the Declaration of Taking, providing for immediate condemnation of title and right to possession and for subsequent ascertainment of just compensation. No question is raised concerning the validity of the taking and judgment of condemnation. The sole questions are the amount and measure of compensation to be awarded the defendant landowners.

QUESTION PRESENTED

By agreement of the parties the right of the defendant to be compensated for the value of the property as enhanced by the improvement was submitted separately on evidence to the Court without a jury in advance of the trial of the question of amount of damages. The mixed question of law and fact submitted to the Court was stated as follows:

> "Whether the plan for taking the subject land was probably within the scope of the project from the time the Government was committed to it, within the meaning of the rule of the United States v. Miller, 317 U.S. 369, 63 S. Ct. 276 [l.c. 281], 87 L. Ed. 336, l.c. 344."

On the determination of this question depends the right of the landowners to compensation for the value of the property as enhanced by the establishment and construction of the Pomme de Terre Dam and Reservoir project.

ULTIMATE CONCLUSION ON QUESTION PRESENTED

Upon the evidence submitted and under the controlling decisions the Court has concluded that 28.82[1] acres of land taken was not probably within the scope of the project from the time the Government was committed to it.

As to the remaining 6.18 acres, it is concluded that the Government is estopped to assert that the defendants are not entitled to value of the property as enhanced by the establishment and construction of the project. There-

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1. Consisting of 26.75 acre and 2.07 acre parts of the 35.00 acre tract in question.

fore, the defendant landowners are entitled to compensation for the value of the 35 acre tract on August 4, 1961, as enhanced by the establishment and construction of the Pomme de Terre Dam and Reservoir project.

FACTS

The relevant facts are not in dispute, having been proved by examination of the employees and officers of the plaintiff United States. Their testimony establishes the following facts:

The Government became committed to the project by Public Law 641 (effective July 2, 1956), 70 Stat. 474 et seq. which authorized the project and appropriated funds for its execution.

The original project design is contained in "General Design Memorandum No. 1" dated April, 1953 (Government's Exhibit 1). This design memorandum was not published and was subject to change. It was a preliminary proposal which preceded the authorization of the project by Public Law 641. This design memorandum was prepared under a land acquisition policy (later changed in October, 1953) whereby the United States generally took land in fee to the "full pool reservoir line" blocked out in 40-acre tracts, taking all of each 40-acre tract partially or wholly within the full pool reservoir line. Under this policy generally no flowage easements were to be acquired. Because this project included hydro-electric power facilities the full pool was a power pool rather than a conservation pool. In this case the full flood pool reservation line was fixed at elevation 879 feet above sea level. The land acquisition plans connected with this original design memorandum will not be noted in detail because the change in land acquisition policy of October, 1953, caused a revision thereof. The land here

in question was originally a part of a 40-acre tract scheduled for acquisition in fee because a portion thereof was within the full power pool reservation line. (The defendants owned a larger tract of which the 40 acres was a part.)

In October, 1953, a new land acquisition policy for Civil Works Projects was promulgated by the Chief of Army Engineers (having responsibility for this project). Pursuant to the new policy the land acquisition plans for the project were revised. The new policy revoked the pre-existing policy, described above, and substituted a policy under which, in reservoir projects, the United States took lesser estates. Under the new policy (set forth in Government Exhibit 4) the United States would acquire fee title up to the elevation calculated by the hydrologists to be subject to flooding once in five years (864 feet above sea level in this case). The rationale of this new policy was that this land would have little value for use of the landowner because of its liability to relatively frequent flooding. Under the new policy, above this elevation the United States would acquire a flowage easement, which is the right to flood occasionally up to the full flood pool reservoir line. This new policy also provided that the United States would acquire in fee certain areas for public access.

Under the new policy the land acquisition plans were revised. The revision was dated June, 1956 (Government Exhibit 5) and entitled Design Memorandum No. 5.

THE 26.75 ACRE PART OF THE TRACT

In respect to the 35 acres here involved, and the 40 acre tract of which it was a part, the revision (dated June, 1956) resulted in exclusion of 26.75 acres thereof

from the acquisition line for reservoir purposes (Plat No. 2, Government Exhibit 5; enlarged in Government Exhibit 6). This revision of June, 1956, scheduled for acquisition 6.25 acres in fee and a flowage easement in 7 acres, all within the 35 acre tract.

However, this revised Design Memorandum covered the subject of public recreational access areas proposing 20 sites from which 14 were to be selected. The 35 acres involved in the case at bar were not originally included in the 20 possible sites (Government Exhibit 5, page D-8). The final selection of access area was to be made in considerations of location, topography, accessibility to township roads, boundaries of ownership and avoidance of severance. The Missouri Conservation Commission, a cooperating state agency, concurred in the selection of the 20 proposed sites.

By indorsement dated December 26, 1956, detailed instructions were given by the Chief of Engineers narrowing the selection of sites (4th indorsement, Government Exhibit 5). Under this detailed policy the access areas were finally selected and announced in 1960. No special consideration was given to the land of defendant landowners as an access area site, and no attempt was made to acquire it at this time.

Sometime between 1956 and 1961, a master plan for the project was completed, printed and published under date of February, 1961. This plan (Government Exhibit 8, Design Memorandum 17A) included the access areas selected, and included a land acquisition line excluding the defendants' 35 acres here involved from acquisition.

THE 6.18 ACRE AND 2.07 ACRE PARTS OF THE TRACT

In 1957, the Engineers secured more accurate engineering data concerning the needs for reservoir purposes and revised the real estate acquisition plans and boundaries in respect to the 35 acres in question. The part of the tract to be excluded was increased from 26.75 acres to 32.93 acres by reducing the proposed fee acquisition to 5 acres from 6.25 acres and reducing the proposed flowage easement from 7 acres to 2.07 acres (Government's Exhibit 9, dated July 24, 1957). This was clearly shown by contracting the boundaries of the project to reduce the area affected by the plans from 13.25 acres to 7.07 acres, a difference of 6.18 acres.

Upon the basis of this new boundary the Government bargained with the landowners and acquired on October 10, 1958, by voluntary conveyance title to 5 acres in fee and a flowage easement of 2.07 acres, leaving the 35 acres in question affected by a flowage easement of 2.07 acres. This deed was recorded. The dealings resulting in the voluntary conveyance by defendants were conducted upon the representation by the Government that the entire 35 acres would be excluded from the project as shown by the 1957 revision of the plans (Government Exhibit 9), except for a flowage easement of 2.07 acres. This bargain left the defendant landowners with direct access to the reservoir at the full flood pool level along and over the 2.07 acres, the subject of the voluntarily granted flowage easement.

In the meantime events transpired which resulted in the ultimate judgment condemning the 35 acres in ques-

tion. In June, 1960, pursuant to a directive, a public hearing was held at Bolivar, Missouri. The location of the 14 selected access areas was announced. Persons residing on the west side of the reservoir commented on the "scarcity" of access area on the west side, where defendants' land was located. As a result of these comments a later meeting was arranged with the representatives of the public, at which 4 new sites on the west side were inspected. Defendants' 35 acres was one of these 4 sites. Early in July, 1960, another public meeting was held at the Wheatland, Missouri, High School, at which it was proposed by those in attendance that defendants' property be acquired for an additional access area. On July 12, 1960, this proposal was supported by a public petition signed by 465 persons. Finally, on March 3, 1961, the acquisition of the defendants' 35 acres for an access area was authorized by teletype. The first time that the project engineers had any idea of seeking approval of acquisition of this property as an access area was in July, 1960.

CONCLUSIONS OF LAW

As indicated in the statement of the question presented the principle controlling this case is announced in *United States* v. *Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336, 147 A.L.R. 55, in the following language:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the tak-

ing of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

"The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities."

In the case at bar, the date of final and definite authorization of, and commitment to, this project was July 2, 1956, when Public Law 641 was enacted containing an appropriation of funds for the project. At this time the scope of the project was defined by Design Memorandum Number 5 which had been revised in June, 1956, one month previously (Government Exhibit 5). The 26.75-acre tract in question was excluded from the acquisition land for reservoir purposes. Therefore, that portion of the tract in question was not probably within the scope of the project for reservoir purposes. However, it appears this revised Design Memorandum Number 5 specified the acquisition of approximately 14 public recreational access areas to be selected from 20 potential sites. The 35-acre tract in question was not included as one of the 20 potential public recreational access area sites. If it had

been so included as a potential site, it would certainly have been within the scope of the project from the time the Government was committed to it. (As stated above, the tract excluded was increased to 32.93 acres in the revision of 1957).

Under date of February, 1961, a presumably final design memorandum was prepared including the acquisition line for reservoir purposes and the selected public recreational access areas. The land acquisition line resulting therefrom did not include the 35 acres in question (Design Memorandum 17A, Government Exhibit 8) except for 2.07 acres subjected to the flowage easement. As an afterthought, and as a result of public pressure originating in 1960, about four years after the Government was committed to the project and in the month following the publication of the supposedly final design memorandum, the acquisition of the defendants' tract of land for an access area was authorized by teletype.

In the meantime, as noted, in reliance upon the scope of the project as shown by the design memorandum upon which the Government became committed to the project, and in reliance upon the 1957 revised plans the defendants voluntarily conveyed to the United States by deed fee and easement interest in 7.07 acres all within the scope of the project and the land acquisition plans of 1956 and thereafter.

Thus, it appears that 26.75 acres of the 40-acre tract in question were not within the scope of the project when the Government became committed to it in 1956. It further appears that the remaining 13.25 acres of the 40-acre tract were within the scope of project by express scheduling of acquisition in fee of 6.25 acres, and of acquisition of a flowage easement over 7 acres (later reduced in 1957

to 5 acres in fee and an easement over 2.07 acres as a result of improved engineering data).

Now the Government condemns for an access area the fee simple title in the 26.75 acres never included, the 6.18 acres eliminated from the project in 1957, and the 2.07 subjected by deed to the flowage easement.

While the 6.18 acres and the 2.07 acres were actually within the scope of the project in 1956, the Government is estopped to assert that the 6.18 and 2.07 acres were not merely adjacent lands subject to enhanced evaluation. It is estopped because of the representations in the 1957 revised plan which resulted in voluntary conveyances of 5 acres in fee and of an easement over 2.07 acres in the belief that the 35 acres had been eliminated for acquisition in fee.

In this connection in respect of the 2.07 acres subject to a flowage easement, the acquisition of the easement did not justify later acquisition of a greater estate upon altered plans in an area including lands not originally in the scope of the project for a later conceived purpose. Calvo v. United States, (C.A. 9) 303 F.2d 902.

Moreover for a period of nearly five years between July 2, 1956, and March 3, 1961, the Government had no apparent intention of acquiring the tract in question as an access area.

Under the circumstances it would be a violation of the Fifth Amendment of the United States Constitution to take the defendants' lands for public use without compensation for the enhanced value of the lands at the time of the taking in July, 1961. This is a case where the acquisition of an access area was conceived not as a part of the original undertaking but as an unanticipated afterthought and as an independent enterprise. See 149 A.L.R. 66, l.c. 88-98.

The primary genius of our Government lies in the spirit and letter of our written Bill of Rights which protects the life, liberty, and property of the individual against Governmental power. The Fifth Amendment prohibiting the taking of private property for public use without just compensation is one of the great guaranties of freedom contained in the Bill of Rights.

It is not in the broad declarations of the Bill of Rights that the rights of the individual are secured. It is in the detailed implementation thereof through judicial and administrative procedures. The working rule announced in the case of United States v. Miller to do substantial justice in eminent domain procedures is a salutary one intended to prevent erosion of constitutionally secured individual rights through ineffective and inequitable judicial procedures. It would be a denial of the right to just compensation guaranteed by the Fifth Amendment to deny the right to enhanced value when the United States has made a sudden and improbable change in the scope of the project over four years after it became committed to the project upon a plan showing definite lines and boundaries for acquisition of property adjacent to the reservoir. This is particularly true when, as in this case, dealings were had with the landowner resulting in voluntary conveyances of contiguous property to the United States on the basis of the apparently definite plans.

The representations of the Government involved in the voluntary negotiations estop the Government to assert that any of the 35 acres were within the scope of the project. Reliance upon these representations is implicit in the negotiations for the voluntary conveyances.

Because the acquisition of the 35 acres in question for an access area was an afterthought, occurring about 17 months after the voluntary conveyances for reservoir

and flowage purposes and more than four years after Congress approved the plans by authorizing the project and appropriating funds therefor, the case at bar falls within that part of the language of the Miller case quoted above reading as follows:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity."

It is not necessary to determine to what extent adjustments in the preliminary plans shown by design memoranda existing at the time the Government is committed to the project may be considered to be probable. If the design memoranda were preliminary plans, unsupported by extensive engineering and obviously subject to substantial revision, and if the revision occurs within a reasonable time and before voluntary conveyances, other considerations may apply. But such is not the case here. In this connection see John L. Roper Lumber Co. v. United States, (C.A. 4) 150 F.2d 329. Cases applying the principles followed here are Blas v. United States, (C.A. 9) 261 F.2d 636; Scott v. United States, (C.A. 5) 146 F.2d 131; and Calvo v. United States, supra.

In the trial of this cause the jury should be instructed that the value of the lands taken should be determined as of the market value at the time the Declaration of Taking was filed in this Court, namely, August 4, 1961. This value should be the fair market value of the land taken as enhanced by its proximity to the Pomme de Terre Reservoir.

VERDICT

We, the jury in the above-entitled cause, find the issues herein in favor of the defendant Tract No. B-215-3, containing 35.00 acres, more or less, and Arlof C. Crance, J. V. Crance, Ralph O. Crance, Minnie Newport, Rose B. McKee, and Elizabeth Miller, and assess the sum of $17,500.00 as just compensation for acquisition of said Tract No. B-215-3.

Signed: NOLENT W. CROW,
Foreman of the Jury.

Filed April 25, 1963.

J. C. TRUMAN,
Clerk.

By D. F. WILSON,
Deputy Clerk.

Attest: A true copy.

J. C. TRUMAN,
Clerk.

By D. F. WILSON,
Deputy.

JUDGMENT UPON VERDICT FIXING COMPENSATION

On April 22, 1963, at the trial of the issue of just compensation for the acquisition by plaintiff of Tract B-215-3 by condemnation, came the United States of America, plaintiff herein, by David M. Proctor, Jr,, Assistant United States Attorney, and came also the defendants, Arlof C. Crance, J. V. Crance, Ralph O. Crance, Minnie Newport, Rose B. McKee, and Elizabeth Miller, by their counsel. The parties announced ready for trial and a jury was duly

impaneled. On the same day, the defendants presented evidence upon the issue of just compensation for said tract.

On April 23, 1963, the jury, in the charge of the bailiff of this court, viewed the 127.5 acres of land of which Tract B-215-3 was a part when said tract was taken by condemnation on August 4, 1961. On the same day, the jury also viewed three tracts of land which the plaintiff had been permitted by the court to designate for that purpose, subject, however, to any objection by the defendants in respect to the same as comparable sales. Said three tracts are identified as follows: (1) 65 acres of land, the subject of a sale between Ernie W. Crates and wife, as sellers, and James L. Bell and R. M. Durham, as buyers; (2) 45 acres of land, the subject of a sale between Earl F. Smith and wife, as sellers, and Cedar Crest Cove, Inc., as buyer; and (3) 21 acres of land, the subject of a sale between Carl D. Bailey and wife, as sellers, and Louie Mariani, Jr. and others, as buyers.

On the same day, the jury also viewed three tracts of land which the defendants had been permitted by the court to designate for that purpose, subject, however, to any objection by plaintiff in respect to the same as comparable sales. Said three tracts are identified as follows: (1) 18.75 acres of land, the subject of a sale between Bertha M. Johnson and Frank McCoy and wife, as sellers, and Antioch Development Company, Inc., as buyer; (2) 10 acres of land, the subject of a sale between Oliver Hunt and wife, as sellers, and L. B. Hunt and wife, as buyers; and (3) 29.97 acres of land, the subject of a sale between O. L. McVay and wife, as sellers, and Olga Peebles, as buyer.

On April 24 and 25, 1963, with the defendants, Rose B. McKee and Ralph O. Crance, present in person and by

counsel, and with the other defendants present by counsel only, the parties presented evidence upon the issue of just compensation for Tract B-215-3. On the latter day, after having heard all the evidence and arguments of counsel, and after receiving instructions of the court, the jury retired for its deliberation and thereafter, on the same day, returned its verdict, finding just compensation for the acquisition of Tract B-215-3 by plaintiff to be in the sum of $17,500.00.

WHEREFORE, in confirmation of said verdict, and in confirmation of the judgment upon declaration of taking made and entered herein on August 4, 1961 (sometimes hereinafter referred to as "judgment of August 4, 1961"), the court CONSIDERS, FINDS, ORDERS, AND ADJUDGES that:

1. For the public uses and under the authority heretofore stated in said judgment of August 4, 1961, the United States of America, plaintiff herein, was and is, at all times herein pertinent, possessed of the right to acquire by condemnation the fee simple title to Tract B-215-3, which is in Hickory County, Missouri, and is more particularly described in said judgment of August 4, 1961.

2. The fee simple title to Tract B-215-3, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines, became vested in the United States of America on August 4, 1961, as evidenced by said judgment of said date.

3. At the time of the condemnation of Tract B-215-3, there were no encumbrances, liens, taxes, or other charges against said tract, except taxes for the year 1961, which taxes have since been paid.

4. In accordance with the aforesaid verdict, the sum of $17,500.00, exclusive of interest, is hereby fixed as the amount of just compensation for the acquisition of Tract

B-215-3 by plaintiff; and said sum is hereby awarded to the defendants, Arlof C. Crance, J. V. Crance, Rose B. McKee, Minnie Newport, Ralph O. Crance, and Elizabeth Miller, in equal shares.

5. To provide for full payment of the foregoing award, plaintiff shall, as soon as may be practicable, deposit in the registry of the court the additional sum of $16,735.00 (which is the amount by which the foregoing award ($17,500.00) exceeds the amount ($765.00) deposited in said registry on August 4, 1961, as estimated compensation for Tract B-215-3), together with interest thereon at the rate of six percentum per annum from August 4, 1961, to and including the date when said additional sum will have been deposited in said registry.

6. Distribution of the foregoing award, together with interest as hereinabove provided, is hereby deferred until further order of this court.

Done in chambers at Kansas City, Missouri, this 13th day of May, 1963.

FLOYD R. GIBSON,
Judge of the United States District Court.

Approved this 10th day of May, 1963.

EDGAR SHOOK,

An Attorney for the Defendants.

FILED May 13, 1963.

J. C. TRUMAN,
Clerk.

By E. J. HAAKE,
Deputy.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,514

United States of America,
Appellant,
vs.
Arlo C. Crance, J. V. Crance, Ralph O. Crance, Minnie Newport, Rose B. McKee and Elizabeth Miller,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

[February 11, 1965]

Before VAN OOSTERHOUT, BLACKMUN AND MEHAFFY, Circuit Judges.

MEHAFFY, Circuit Judge.

The United States Government acquired from the Crance Estate by condemnation 35 acres of land in Hickory County, Missouri, for use as a public access and recreational area in connection with construction of the Pomme de Terre Dam and Reservoir. The condemned property was part of a 132.5 acre tract of land abutting the reservoir and owned by appellees. Prior to the condemnation proceedings, the Government had acquired 5

acres of this original tract in fee and a flowage easement on 2½ acres, leaving 127.5 acres in possession of appellees.

The parties agreed to submit to the District Court in advance of jury trial the issue as to whether compensation for the condemned acreage was subject to the rule in United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943) which precludes an enhanced evaluation because of the land's proximity to the project if the land was probably within the scope of the project from the time the Government was committed to it. The District Court found from the evidence that the condemned property was not within the probable scope of the project at this time, and, therefore, valuable as lakefront property enhanced by its proximity to the reservoir. [214 F. Supp. 792 (W.D. Mo. 1962)] Thereafter, the jury found the enhanced value of the 35 acres in question to be $17,500.00, and from this verdict, the Government has appealed.

The Government submits that the District Court erred (1) in permitting an enhanced award created by a Government improvement; (2) by invoking against the Government the doctrine of estoppel; and (3) in misinstructing the jury on the meaning of "special benefits."

Plans for a dam and reservoir project of this nature are first tentatively prepared by the United States Army District Engineers. Thereafter they are submitted to the Division Engineer for review, and finally to the office of the Chief of Engineers for his modification, rejection or approval. The first design memorandum of the Pomme de Terre Reservoir was prepared pursuant to the then existing policy whereby the Government acquired land up to the full flood pool reservoir line blocked out in 40 acre tracts, taking all of any 40 acre tract which lay partially or wholly within the full flood pool line. Under this

policy, the 35 acres here involved would have been acquired in fee by the Government for reservoir purposes. However, in October, 1953, the Government established a new land acquisition policy providing for the taking of fee title for reservoir purposes up to a land elevation calculated to flood once in five years and the taking of flowage easements up to the full flood pool line. Under this new policy, the Government revised downward the amount of land to be taken from the Crance property for reservoir purposes to 6.25 acres in fee and flowage easements to 7 acres above the fee line. Later in 1957, after further engineering study, the amount of the Crance land to be taken for reservoir purposes was reduced to 5 acres in fee and 2.07 acres in flowage easement. The Government acquired the 5 acres in fee and the 2.07 acres in flowage easement from the Crance Estate by voluntary sale and purchase on October 10, 1958.

From its inception this project contemplated, in addition to the dam and reservoir, recreational facilities for public use around the reservoir. The rule of thumb then existing for lands to be taken for recreational areas was one such area approximately every five miles of shoreline. This rule later became a directive incorporated in the engineers' manual. The public recreational areas were to consist of from 20 to 40 acre tracts, and were to be located at sites depending on a number of factors—topography of the land, accessiblity to roads, avoidance of severage, depth of water, scenic qualities, location in respect to other sites, the effect of a drawdown of the conservation pool, and tree cover. The object was to acquire accessible public recreational areas that could be utilized year around for aquatic sports, overnight camping, boat ramps and group shelters.

Under the Government's original land acquisition policy providing for the taking of all of a 40 acre tract when any of it was needed for the reservoir, there could well have been sufficient surplus area acquired for public access and recreational purposes. This was not the case, however, under the new policy. The new policy specifically authorized the taking of additional lands in fee for this ancillary purpose.[1]

In June of 1956, a memorandum originating at the District Engineers level was submitted containing a list of fourteen potential sites for public use areas selected from over twenty such sites considered around the reservoir. The office of the Chief of Engineers reduced this number to eight, excluding two proposed sites within one and one-half miles of the Crance property. At that stage, the 35 acres involved was not considered. The rejection of these two areas on the west side of the reservoir left no recreational areas in the vicinity of the Crance property for a shoreline distance of twelve to fifteen miles.

The Government does not publicize its proposal for recreational areas until after a public meeting is held to receive suggestions and criticisms from members of the community affected regarding the over-all plans for the reservoir. In June of 1960, the public was notified that a tentative plan for recreational areas had been developed and comment and suggestions would be invited at a sub-

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1. Extract from Government real estate land acquisition policy for Civil Works projects distributed October 12, 1953 appearing in Govt. Ex. 4:

> "1. Lands to be acquired in fee. The fee title will be acquired to the following lands:
>
> * * *
>
> "d. Additional lands which may be needed to provide for limited public use and reasonable access in accordance with applicable laws, or for operation and maintenance of the project."

sequent hearing. On June 27, 1960, some one hundred forty-seven persons attended the hearing and were informed of the project's plans generally and that it was about 67% complete with some 82% of the real estate acquired. Maps were displayed showing the proposed eight public use areas. Those attending were advised that all suggestions be made at this meeting so the Engineers could forward the plan to higher authority for final approval. Various persons present suggested that the plan for the west side of the reservoir in the vicinity of the Crance property failed to provide for a suitable public use area. A petition to this effect was submitted to the Engineers signed by some four hundred sixty-five persons.

Thereafter, a representative of the District Engineer together with a committee of the public inspected four additional sites, one of which was the 35 acre tract in question. Another public meeting was held on July 12, 1960 announcing consideration of these sites. From the four sites inspected, the Crance 35 acre tract was selected and proposed as a public use area. The reports of the public meetings were duly forwarded to the Chief of Engineers who authorized the acquisition of the 35 acres on March 3, 1961.

Due to the Government's inability to obtain the 35 acre tract by voluntary purchase, the instant condemnation proceedings were instituted.

[1] The threshold question is whether land taken by eminent domain for an integral part of a Government project should be valued at an enhanced price because of proximity to the project, when the land taken was not specifically delineated at the time of authorization of the project, yet located in an area where it might likely be acquired.

Public access and recreational areas were from the very beginning an integral part of this project. The first design memorandum in 1953 prepared under the then existing governmental land acquisition policy included the Crance property to be taken in fee. The new land acquisition policy, however, became effective prior to the appropriation act of the Congress by Public Law 641 effective July 2, 1956. At the time of the congressional act, there existed a "Design Memorandum" including maps delineating the lands recommended to be taken under the new policy. This was not a final or approved plan, but did indicate the Engineers' projection of the fee line subject to flooding during five year periods and the flowage easement line subject only to occasional flooding. A part of the Crance property was within the fee and flowage easement lines.

The contention of appellees is that the Government is bound by this map on the theory it did not indicate that all of the Crance property would be taken for reservoir purposes, and, therefore, the remainder of appellees' land was outside the scope of the project and entitled to any enhanced evaluation resulting from the governmental expenditures. The demarcation on the map was at most a preliminary drawing. It was not a final delineation of the total project area inclusive of recreational sites because it had not been approved by the Chief of Engineers. Until such approval by the Chief of Engineers the work products of the District Engineer and the Area Engineer are mere recommendations subject to revision.

It is true that by this time the District Engineer had considered some twenty sites for possible access and recreational purposes which did not include the Crance property and had recommended fourteen for approval. The Chief of Engineers rejected all of the proposed sites with

the exception of eight and required resubmission for approval of any deviation.

Appellees further contend that by reason of the Chief of Engineers' approving eight such sites without consideration of the Crance property, the Crance property was excluded from the project as a recreational site. Appellees' position is untenable for several reasons. First, this was not a final plan. It was not until later in 1957 that an engineer was selected to prepare the master plan for recreational purposes. Furthermore, the Chief of Engineers' admonition to resubmit deviations corroborates the lack of finality of the recreational plan at this stage. Additionally, this tentative selection occurred before a public meeting was held to brief the community on the over-all reservoir plan and obtain their suggestions and criticism particularly with respect to recreational features. In fact, the public meeting resulted in a committee being formed to accompany a representative of the District Engineer on an inspection of the west side of the reservoir to consider potential public access and use areas in the vicinity of the Crance property where a deficiency of such areas existed by reason of rejection of two previously proposed sites. There followed another public meeting and of the four additional sites examined, the Crance property was recommended as the most suitable. This site was ultimately approved by the Chief of Engineers.

Neither the fact that a line on a map tentatively projecting the reservoir boundary at the Crance location nor the fact that other recreational sites were approved prior to the selection of the Crance property would justify application of a different and higher standard of evaluation to the Crance property. To hold, in effect, on a project of this type that simply because this particular tract of land was not delineated on a map at the time of ap-

propriation of funds for the project by Congress, it had been excluded, would be giving undue weight to the proposed diagram of the reservoir plan. Actually, there is no practical way to absolutely delineate with finality the areas abutting the reservoir line at the inception of the project which would be most suitable for recreational purposes. Extensive engineering studies must first go into the planning for the dam and reservoir. Moreover, the fact that the proposed perimeter of the reservoir was changed from the boundary depicted by the map that existed at the time of congressional authorization after subsequent engineering study demonstrates this very problem. The unreliability for surrounding land evaluation purposes of such preliminary maps when unsupported by extensive engineering data is aptly illustrated in John L. Roper Lumber Co. v. United States, 150 F.2d 329 (4th Cir. 1945). In that decision the Government was held not bound in a condemnation proceeding by a preliminary map prepared by certain officers of the Marine Corps who were inspecting a proposed site for a military installation. Although the map did not include the adjoining land ultimately condemned for a military housing project, the fact that it was unsupported by engineering data and because the original plans of the installation contemplated such a housing project, the landowner was denied any enhanced value as a result of his land's proximity to the improvement.

The dam and reservoir are the more important aspects of the project and their space requirements in the instant situation necessitated the dislocating of four hundred families. Not until the reservoir lines are finalized, can there be a practical final determination as to the number and location of the necessary recreational sites.

The significant factor here is that this project contemplated recreational areas from its very inception and cer-

tainly property lying beyond a perimeter of the reservoir would probably be incorporated for recreational purposes if the land acquired for the reservoir alone was not also sufficient for recreational utilization. Since the Crance property abutted the reservoir line, it was within the sphere of probable acquisition for recreational use. Therefore, the rule in Shoemaker v. United States, 147 U.S. 282, 13 S. Ct. 361, 37 L.Ed. 170 (1893) precludes the increment in value in computing just compensation. In that case, the authorization was for the Government to take a tract of land for park purposes not exceeding two thousand acres lying on both sides of a stream and within certain limits. The land to be taken was not delineated but the general area and confines were. There is no legal distinction between Shoemaker and the instant case, except in that situation the general area of taking within certain lines was delineated, whereas here the encompassing delineation was obvious from the boundaries of the reservoir area.

Miller, supra, 317 U.S. at 379, 63 S.Ct at 282 cites Shoemaker with approval:

> "In the Shoemaker case the court excluded any increment of value arising out of the fact that Congress had authorized the location and condemnation of land for the park, for the very reason that Shoemaker's property lay in the area within which the park was to be laid out. If, in the instant case, the respondents' lands were, at the date of the authorizing Act, clearly within the confines of the project, the respondents were entitled to no enhancement in value due to the fact that their lands would be taken. *If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value* calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken.

In so charging the jury the trial court was correct." (Emphasis supplied)

In United States v. Rayno, 136 F.2d 376 (1st Cir. 1943), the landowner was also denied market value of his land for other than agricultural purposes despite his contention he was entitled to the benefits of evaluation due to the nearby construction of a dam from a peculiar soil deposit to be excavated from his property. Applying the Miller doctrine, the court concluded that acquisition of the land was probably within the scope of the flood control project from the time the Government became committed to it, because the special soil deposit which the condemned land contained was contemplated as needed to build the type of dam upon the place selected.

It is rudimentary in condemnation proceedings that a landowner cannot claim a benefit from a proximate improvement when inclusion of his land in the improvement from the outset renders impossible enjoyment of the claimed benefit. See, e. g., St. Louis Elec. Terminal Ry. Co. v. MacAdaras, 257 Mo. 448, 166 S.W. 307 (1914).

The Fifth Amendment does not contain any standard of fairness for determining "just compensation." United States v. Cors, 337 U.S. 325, 69 S.Ct. 1086, 93 L.Ed. 1392 (1949). The so-called working rules of judicial expressions are nothing more than efforts by the judiciary for arriving at equitable awards under varying circumstances. The Supreme Court stated in Bauman v. Ross, 167 U.S. 548, 570, 17 S.Ct. 966, 975, 42 L.Ed 270 (1897), "Just compensation means a compensation that would be just in regard to the public, as well as in regard to the individual * * *." In the later case of United States v. Commodities Trading Corp., 339 U.S. 121, 124, 70 S.Ct. 547, 94 L.Ed. 707 (1950), cited with approval in United States v. Virginia Electric & Power Co., 365 U.S. 624, 631, 81 S.Ct. 784, 789, 5 L.Ed.

2d 838 (1961), the Supreme Court stated, "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' * * *."

It would be an unfair cost to the public to allow appellees an enhanced value under the circumstances. The property condemned was taken during construction from an area of probable acquisition for fulfillment of a recreational purpose which was within the scope of the project from its inception.

The District Court found that because of the Design Memorandum in existence when Congress appropriated funds for the project, 8.25 acres of appellees' lands was within its scope. The District Court ruled, however, that the Government was estopped to assert that this 8.25 acres was not subject to enhanced valuation, because representations in a revised plan resulted in the voluntary conveyance of 5 acres in fee for the reservoir by appellees who were thereby led to believe their remaining 35 acres had been excluded from fee acquisition. The District Court's ruling is based on the assumption that the original and revised Design Memoranda represented final plans delineating the entire project.

[2, 3] None of the tentative maps, oral representations or deeds of the Government agent who negotiated the purchase for the reservoir of a part of appellees' property could have operated to estop the Government. The record is barren of any evidence that appellees relied on either a map or other representation by the Government agent in consummating this sale. Thus, the essential elements of estoppel lack evidentiary support. See California State Board of Equalization v. Coast Radio Products, 228 F.2d 520, 525 (9th Cir. 1955). Furthermore, there is no evidence that the Government negotiator had authority to bind the Government. We held in United States v. Hof-

fart, 256 F.2d 186 (8th Cir. 1958) that the Government is not bound by unauthorized acts of its agents. The Supreme Court said, speaking through Mr. Justice Frankfurter, in Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947):

> "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."

We therefore find that under the evidence the District Court erred in applying the doctrine of estoppel.

The District Court instructed the jury, in effect, that for benefits to be special, they must be such as not enjoyed generally by other tracts of land in the neighborhood, no portion of which is taken for the public use area.[2]

[4] It is settled that special benefits do not become general merely because other lands in the area are similarly benefited. United States v. River Rouge Improvement Co., 269 U.S. 411, 46 S.Ct. 144, 70 L.Ed. 339 (1926); United States v. 2,477.79 Acres of Land, 259 F.2d 23 (5th Cir. 1958); Aaronson v. United States, 65 App.D.C. 14, 79 F.2d 139 (1935). The District Court's definition of "special benefits" is inaccurate.

The judgment is reversed and remanded for proceedings not inconsistent with this opinion.

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2. "Now, what do we mean by special benefits? The Court instructs you that the term special benefits, as used in these instructions, means any benefits causing an increase in the market value of the 92½-acre tract of land directly by reason of its position in relation to the Wheatland public access area, and which benefits are not enjoyed generally by other tracts of land in the neighborhood, no portion of which land is taken for said public access area, and such benefits are special and not (Tr. 411) general benefits, although conferred, and if you find that the benefits of the access area are general to the larger area of land in that vicinity or to the public generally, they would be public or general benefits and not special benefits."

INSTRUCTIONS RELATING TO SPECIAL BENEFITS

"Now, the government contends that as of the date of taking, August 4, 1961, the 92 1/2 acre portion of defendants' land which was not taken in the proceeding was especially benefited through enhancement or increase in value due to that portion's nearness to the recreational facilities to be provided in the Wheatland public use area, of which the 35 acres taken forms a major or a substantial part. The defendants deny any resulting benefits to the 92 1/2-acre tract.

"Now, what do we meant by special benefits? The Court instructs you that the term special benefits, as used in these instructions, means any benefits causing an increase in the market value of the 92 1/2-acre tract of land directly by reason of its position in relation to the Wheatland public access area, and which benefits are not enjoyed generally by other tracts of land in the neighborhood, no portion of which land is taken for said public access area, and such benefits are special and not general benefits, although conferred, and if you find that the benefits of the access area are general to the larger area of land in that vicinity or to the public generally, they would be public or general benefits and not special benefits.

"However, if you find that on August 4, 1961, all or any part of the 92 1/2-acre tract, the balance of the tract remaining, was so specially benefited, then you should estimate the increase in market value of the defendants' remaining land or any part thereof specially benefited, and then offset the same against the market value, fair market value of the 35 acres.

"To give effect to such offsetting special benefits, if any, you should first determine the fair market value of

the whole 127 1/2 acres of defendants' land immediately before the taking of the 35 acres therefrom, but without considering any effect which the Wheatland public use area may have had on defendants' land.

"You will next proceed to determine the fair market value of the remaining 92 1/2 acres immediately after the taking of the 35 acres, but this time giving whatever special benefit effect, if any, which the public use area would have had on the market value of the 92 1/2 acres. If you find that the remaining 92 1/2 acres increased in value immediately after the taking of the 35 acres, as contended by the government, your determination of the fair market value of the remaining 92 1/2 acres immediately after the taking of the 35 acres should reflect the increase in value of the 92 1/2 acres.

"From the foregoing it would necessarily follow that the difference between the fair market value of the defendants' 127 1/2 acres of land immediately before the taking and the fair market value of the remaining 92 1/2 acres immediately after the taking will represent the amount of just compensation to which you find the defendants are entitled to in this proceeding." (R-148, 149).